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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

PUBLIC UTILITIES  
COMMISSION

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In the Matter of the Application	)	DOCKET NO. 2009-0048
	)	
of	)	
	)	
MOLOKA'I PUBLIC UTILITIES, INC.	)	
For review and approval of rate	)	
increases; revised rate schedules;	)	
and revised rules.	)	
_____	)	

**COUNTY OF MAUI'S MEMORANDUM IN OPPOSITION TO MOTION TO  
DISMISS COUNTY OF MAUI AS AN INTERVENOR**

**CERTIFICATE OF SERVICE**

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DISMISS COUNTY OF MAUI AS AN INTERVENOR**

COUNTY OF MAUI (the "County"), by and through its attorneys, BRIAN T. MOTO, Corporation Counsel, JANE E. LOVELL, Deputy Corporation Counsel, and BRONSTER HOSHIBATA, opposes Molokai Public Utilities, Inc.'s Motion to Dismiss County of Maui as an Intervenor, filed February 3, 2010.

**I. INTRODUCTION**

Molokai Public Utilities, Inc. ("MPU") seeks to exclude the County from this proceeding based on three grounds. First, MPU complains that the County has unreasonably broadened the issues by submitting information requests which MPU baldly claims are overly broad and irrelevant. Second, MPU claims it was foreclosed from submitting information requests to the County because the County did not submit any direct testimony and therefore, MPU will be "unfairly surprised" at the evidentiary hearing. Third, MPU falsely accuses the County of acting with a "callous disregard" for the Commission's procedures,

practices and orders, and unabashedly claims that the County's continued participation in this proceeding will result in a protracted evidentiary hearing causing undue delay.

MPU's arguments are without merit. The County has not broadened the issues in this proceeding. The County's information requests to MPU and to its parent company, Molokai Properties, Ltd. ("MPL"), were designed to shed light on the issues which the Commission deemed to be implicitly incorporated in the issue of whether MPU's proposed rate increases are just and reasonable.<sup>1</sup> Furthermore, and as recognized by the Commission, these issues are consistent with specific statutory provisions concerning rate making applications, HRS §§ 269-16(e) and 269-19.5.<sup>2</sup>

The County has not acted with "callous disregard" of the Commission's practice, procedures and orders, nor have the County's actions been designed to "unfairly surprise" MPU. MPU's claim of unfair surprise is premature and would only be valid if the County attempted to bring in witnesses at the evidentiary hearing, at which point MPU would be entitled to object.<sup>3</sup> Further,

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<sup>1</sup> See *Order Approving Proposed Procedural Order, as Modified, filed November 6, 2009 at 4.*

<sup>2</sup> See *Order Denying Molokai Properties, Limited's Motion for Reconsideration, filed November 25, 2009 at 9.*

<sup>3</sup> The County does not intend to call any "surprise" witnesses at the evidentiary hearing.

the County's decision to direct its resources to cross-examine witnesses at the evidentiary hearing rather than file direct testimony is not improper and does not violate any rule or order of this Commission. Thus, MPU's claims that it will be unfairly surprised or that MPU has been precluded from obtaining information from the County is not credible.

**II. THE COUNTY'S INFORMATION REQUESTS HAVE FOCUSED ON ISSUES THE COMMISSION DETERMINED ARE IMPLIED ISSUES IN THIS RATE MAKING PROCEEDING**

Contrary to MPU's bald assertions, the County has not unreasonably broadened the issues in this rate making proceeding, nor has the County "callously disregarded" the Commission's procedure, practices and orders. Rather, the County focused squarely on issues which are properly before the Commission. The Commission even recognized that some of the County's proposed issues are implied in the stated issues contained in the Procedural Order approved by the Commission on November 6, 2009.

Specifically, the Commission ruled that the following issues are implicitly incorporated in Issue No. 1<sup>4</sup> set forth in the Procedural Order:

- 1g. Whether MPU's financials adequately reflect the income of MPU and if not, whether, to adequately reflect the income of MPU, the commission should distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among entities that own or control MPU, directly or

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<sup>4</sup> Issue No. 1 is: "Are MPU's proposed rate increases just and reasonable?" *Procedural Order at 2.*

indirectly?<sup>5</sup>

- 1h. Whether any contracts between MPU and affiliated companies entered into after July 1, 1988 are valid and effective for purposes of HRS § 269-19.5, whether the terms and conditions of such contracts are unreasonably or otherwise contrary to the public interest, and whether any payments made by MPU pursuant to the contracts or transactions are unreasonable and should be excluded by the commission for ratemaking purposes?<sup>6</sup>
3. Do the projected expenses or projected rate base reflect assurances of reliable delivery of potable water at reasonable rates?

*Order Approving Proposed Procedural Order, as Modified, filed November 6, 2009 at 4; see also, Order Denying MPL's Motion for Recon. at 9 - 10.*

The County submitted information requests to MPU intended to shed light precisely on these issues. The County requested corporate documents (e.g., articles of incorporation, by-laws), corporate minutes, and stock certificates, as well as financial information, including financial statements, tax returns, documents evidencing financial transactions and agreements between MPU, MPL, and affiliated companies. Thus, the County's information requests are hardly consistent with efforts to "unfairly surprise" MPU.

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<sup>5</sup> The Commission previously acknowledged that item 1g is consistent with HRS § 269-16(e). *Order Denying Molokai Properties, Limited's Motion for Reconsideration, filed November 25, 2009 ("Order Denying MPL's Motion for Recon.") at 9.*

<sup>6</sup> The Commission acknowledged that item 1h is consistent with HRS § 269-19.5. *Order Denying MPL's Motion for Recon. at 9.*

The information requested by the County is relevant and material to the issue of whether MPU's financials adequately reflect the income of MPU and if not, whether the Commission should make any adjustments permitted by HRS § 269-16(e). Further, the information requested by the County is relevant as to whether any contracts or other financial transactions between MPU, MPL and its affiliated companies are contrary to the public interest and/or unreasonable, and therefore, should be excluded by the Commission for rate making purposes as permitted by HRS § 269-19.5.

Simply because MPU does not agree that the County's requests are relevant does not mean the County is unreasonably broadening the issues in this proceeding, especially where the Commission has deemed these issues to be incorporated into the main issue of whether the proposed rate increases are just and reasonable.<sup>7</sup> Perhaps MPU's motion to dismiss the County is a thinly veiled attempt to avoid shedding light on the very issues the Commission has deemed to be implied in this proceeding.

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<sup>7</sup> MPU also accuses the County of broadening the issues in this proceeding because the County declined to agree with MPU, MPL, and the Consumer Advocate in stipulating to a procedural order. *Motion at 3*. This claim is incredible. Parties can agree to disagree on certain issues, and as evidenced by the County in its submission of a proposed procedural order, the County did not agree to the procedural order because the County did not want to be precluded from raising the issues the County considered to be relevant. *County's Proposed Procedural Order, filed October 28, 2009, at 1 - 2*. Apparently, according to MPU, if a party does not agree with MPU, then the party is needlessly broadening the issues.

### **III. THE COUNTY HAS A RIGHT TO PARTICIPATE IN THIS PROCEEDING THROUGH CROSS-EXAMINATION OF WITNESSES**

Contrary to MPU's allegation that the County "failed" to file direct testimony, the County chose not to file direct testimony and instead decided to challenge MPU's proposed rate increases through cross-examination. The County has a right to participate in this proceeding and has the right to conduct cross-examination "as may be required for a full and true disclosure of the facts." See HAR § 6-61-33.

MPU erroneously suggests that the County acted in bad faith and intends to "surprise" MPU at the evidentiary hearing, thereby prolonging the evidentiary hearing in this matter. MPU is wrong and its claim that the County is acting with "callous disregard" of the Commission rules, procedures, and orders is unfounded.

There is no requirement that the County submit direct testimony in this proceeding. The County's decision not to file direct testimony was based solely to save its resources for the evidentiary hearing and was not intended to unfairly surprise MPU. The County does not intend to call any "surprise" witnesses. If the County does so, MPU may object at the evidentiary hearing.

The County has a separate role in this proceeding. As recognized by the Commission, the County's participation as an intervenor "will assist the

Commission in developing a sound record[.]”<sup>8</sup> Further, as the County noted in its Motion to Intervene, the dispute began with a threat by MPL to close down its wholly-owned utilities, including MPU, coupled with a demand that the County step in and take over the utilities at the County’s expense. *Motion to Intervene at Exhibit A, pp. 2 - 3*. In PUC Docket No. 2008-0115, the Commission and the Consumer Advocate appeared to take the position that the County could be forced to acquire and operate the utilities. *See Division of Consumer Advocate’s Statement of Position filed June 25, 2008 at 1*. The County is the only entity that has been identified by MPU, MPL, and the Commission as having any potential responsibility in case MPU shuts down. Thus, the County’s participation as an intervenor is necessary for the County to protect its interests and is critical to developing a sound record in this case.

The County’s intervention in this proceeding was intended, in part, to address any issues that might arise regarding the County’s legal obligations of MPU, MPL, and the County. The County’s position in this case is based largely on legal principles rather than on disputed facts. Therefore, the County determined that no written direct testimony was necessary, and issues related to the reasonableness of the rate increases could be adequately addressed through cross-examination.

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<sup>8</sup> See *Order Granting Intervention to the County of Maui, West Molokai Association, and Stand for Water, filed October 16, 2009 at 28*.



#### **IV. MPU WAS NOT PRECLUDED FROM SERVING INFORMATION REQUESTS UPON THE COUNTY**

MPU falsely claims that it was precluded from serving information requests upon the County because the County did not submit any direct testimony. *Motion at 4*. This claim is not credible. Intervenor West Molokai Association ("WMA") served Information Requests on the County (to which the County responded).<sup>9</sup> The County and WMA both served Information Requests upon MPL despite MPL's lack of direct testimony.<sup>10</sup> While MPL objected to the

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<sup>9</sup> To further disparage the County, MPU complains about the County's responses to WMA's Information Requests. Specifically, MPU complains that the County objected to providing citations to the laws and regulations with which the County believes MPU is non-compliant. *Motion at 6*. Indeed, the County objected to the request because it improperly asked for the mental impressions, conclusions, opinions, and/or legal theories of counsel which are not the proper subject of discovery or information requests. MPU conveniently omits from its Motion that, notwithstanding the County's objections, the County responded further:

Without waiving such objections and subject to them, the County responds that documents provided to the PUC in this docket by customers of the utility suggest that the utility has exceeded MCLs or other applicable water quality standards on occasion. In addition, the County is informed and believes that the utility, or its affiliates, are operating Well 17 without a permit in violation of HRS Chapter 174C-48.

*See County of Maui's Responses to West Molokai Association's Information Requests to the County of Maui, filed January 28, 2010, at 1 - 2.*

<sup>10</sup> MPU did not object to its parent company, MPL, "failing" to submit direct testimony in this proceeding. Apparently, MPU applies the rules and orders in this proceeding differently, depending on whether a party is affiliated with MPU or not.

County's Information Requests on several grounds, MPL did not object to being served with Information Requests because it did not submit direct testimony. Thus, MPU's claim that it was precluded from serving Information Requests on the County is not credible. Had MPU submitted Information Requests to the County, the County would have responded appropriately.

## **V. CONCLUSION**

For the foregoing reasons, MPU's Motion to Dismiss the County of Maui should be denied. The County's participation in this proceeding as an intervenor is necessary and proper, and the County has not unreasonably broadened the issues in this case. Rather, the County has acted to develop the record and to shed light on issues the Commission determined are implied in this proceeding. MPU's motion is simply an attempt to avoid answering relevant issues and therefore should be denied.

DATED: Honolulu, Hawaii, February 10, 2010.

A handwritten signature in black ink, appearing to read 'Margery S. Bronster', written over a horizontal line.

MARGERY S. BRONSTER  
JEANNETTE H. CASTAGNETTI  
Bronster Hoshibata

BRIAN T. MOTO  
JANE E. LOVELL  
EDWARD S. KUSHI, JR.  
Department of the Corporation Counsel

Attorneys for County of Maui

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**CERTIFICATE OF SERVICE**

Pursuant to Hawaii Administrative Rules § 6-61-21(d), the undersigned certifies that a true and correct copy of the foregoing document was duly served on the following parties on February 10, 2010, at their last known addresses in the manner specified below:

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**HAND DELIVERY**

DATED: Honolulu, Hawaii, February 10, 2010.

  
MARGERY S. BRONSTER  
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Bronster Hoshibata

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